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No. 04-1581

In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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Questions Presented

1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).

2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or

(b) grassroots lobbying communications generally,

with any communications to be funded either from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

The disclosure statement in the *Jurisdictional Statement* is unchanged. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), Pub. L. 107-155, 116 Stat. 81, 114.

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Opinions Below

The unreported district court *Order* and *Memorandum Opinion and Order* dismissing this case with prejudice are in the Appendix ("JS-App.") to the *Jurisdictional Statement* ("JS") at JS-App. 1a and 2a. The unreported *Memorandum Opinion and Order* denying preliminary injunction is included, JS-App. 4a-17a, because the opinion dismissing the case said that the court did so "for the reasons set forth in its prior opinion," i.e., the preliminary injunction opinion. JS-App. 2a-3a.

Jurisdiction

The *Order* and the *Memorandum and Order* dismissing this case were dated May 9 and filed May 10, 2005. WRTL's *Notice of Appeal of Dismissal to U.S. Supreme Court* was filed and served on May 12, 2005. JS-App. 33a. Appeal is taken pursuant to 28 U.S.C. § 1253 (direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and BCRA § 403(a)(3), 116 Stat. at 114 (direct appeal to the Supreme Court of the district court's "final decision"). JS-App. 23a.

Constitutional, Statutory, Regulatory Provisions

The First Amendment to the Constitution is in the *Jurisdictional Statement* Appendix at JS-App. 18a.

2 U.S.C. § 434(f)(1)-(3) (the "electioneering communication" definition) is at JS-App. 18a.

2 U.S.C. § 441b(a)-(b)(2) ("electioneering communication" prohibition) is at JS-App. 21a.

BCRA § 403 (jurisdictional statute) is at JS-App. 23a.

11 C.F.R. § 100.29 (definition) is at JS-App. 24a.

11 C.F.R. § 114.2(a)-(b) (prohibition) is at JS-App. 29a.

11 C.F.R. § 114.14 (prohibition) is at JS-App. 31a.

Statement of the Case

In the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, Congress defined "electioneering communications" as targeted, broadcast communications that reference a clearly identified candidate within 60 days before general (or special or runoff) elections and 30 days before primaries (or nominating conventions or caucuses). JS-App. 19a (2 U.S.C. §434(f)(3)). Congress prohibited corporations from using general treasury funds to pay for electioneering communications. JS-App.21a-22a (2 U.S.C. § 441b(a)-(b)(2)) ("prohibition").

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld this prohibition against a First Amendment facial challenge, not being "persuaded that plaintiffs ha[d] carried their heavy burden of proving that [the prohibition] [wa]s [substantially] overbroad." *Id.* at 207 (citing *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

The present case is a constitutional challenge to the prohibition as applied to grassroots lobbying, brought under the First Amendment guarantees of free speech, association, and petition and under the inherent, reserved constitutional right of the sovereign people in a republican system of government to communicate with citizens urging them to contact their representatives concerning pending legislative matters.

In July 2004, Senate filibustering of President Bush's judicial nominees reached unprecedented, double-digit levels and was coming to a head. On July 21, the Senate failed to invoke cloture on the ongoing filibuster of the nomination of William Gerry Myers III as a judge on the U.S. Court of Appeal for the Ninth Circuit. Record 30:3[1]

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[1]References to the Record are to the docket number assigned to each document followed by the internal page number of the document (if any such point cite is needed).

(*Amended Verified Complaint* ¶ 8 ("*AVC*"))[2]; 150 Cong. Rec. S8459-60. A fall showdown was predicted. Record 30:3 (*AVC* ¶¶ 8-11); Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.[3]

WRTL launched a grassroots lobbying campaign encouraging its Senators to oppose the filibuster. Record 30:3-4, 7-8 (*AVC* ¶¶ 12-13, 25-33). On July 26, 2004, WRTL began broadcasting a radio advertisement entitled "Wedding." Record 30:3 (*AVC* ¶ 12), JS-App.6a. The district court included a transcript of "Wedding" along with the transcripts of WRTL's two other proposed advertisements at the end of its August 17, 2004 *Memorandum and Order*, JS-App. 13a-17a (*AVC* Exhibits A-

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[2]WRTL relies on the *AVC* (Record 30) and the *Affidavit of Barbara L. Lyons* ("*Lyons Affid.*") (Record 20, attachment 1; order granting motion to file affidavit, Record 21). There were also findings of fact ("FOF") made by the district court in its August 17, 2004 *Memorandum Opinion and Order* denying WRTL's preliminary injunction motion. JS-App. 4a-5a. These findings of fact include facts about activities by WRTL and its PAC beyond the pleadings and the grassroots lobbying communications at issue here. *Id.* The August 17 *Memorandum Opinion and Order* stated: "having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact." JS-App. 4a. But the court incorporated the August 17 *Memorandum Opinion and Order*, along with its found facts, in its *Order*, JS-App. 1a, and *Memorandum Opinion and Order*, JS-App. 2a-3a, dismissing the case. *See infra* at note 7. The other activities of WRTL and WRTL-PAC are discussed *infra* at 35.

[3]Senate Republican leaders decided in November not to press the predicted confrontation at that time. *See* Paul Kane, *GOP Cools to Judicial Gambit*, Roll Call, Sep. 13, 2004. Majority reelection of President George W. Bush and Republican increases in both houses of Congress in the November 2004 election minimized the Democrat argument for filibusters somewhat, *see 'Nuclear' Truce*, Roll Call, Nov. 17, 2004, and the filibuster problem was at least temporarily put to rest by an agreement among a bipartisan coalition of Senators. *See* Paul Kane & Mark Preston, *Fourteen Senators Sign Off on Compromise*, May 23, 2005.

C).[4] WRTL intended to continue broadcasting "Wedding" and to begin and continue broadcasting the other two grassroots lobbying ads, and materially similar ads, throughout August 2004 and until the adjournment of Congress, including through electioneering communication prohibition periods. Record 30:3-4, 7 (*AVC* ¶¶ 12-13, 28-29); JS-App. 5a (FOF 10).

From August 15 to November 2, 2004 (80 days, including November 2), WRTL's ads would have been prohibited electioneering communications. Record 30:2,

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[4]The details of WRTL's broadcast ads indicate that they were authentic grassroots lobbying and not electioneering. As to *topic*, they concerned only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly-identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any political party, to the candidate's record or position on any issue, to the candidate's character, qualifications, or fitness for office, or to the candidate's election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate. In addition, they could have been run only with money from a "segregated bank account" under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief. Record 30:9-10 (*AVC* ¶¶ 38-50). The ads were broadcast independent of any candidate or political party. Record 30:10 (*AVC* ¶ 50) (*see* 11 C.F.R. § 109.20(a)). These details demonstrate that, under any reasonable test, the ads were genuine grassroots lobbying.

4, 6 (*AVC* ¶ 6, 13-14, 23-34); JS-App. 4a-5a (FOF 3-4, 10-12)[5]

WRTL did not challenge the BCRA disclaimer and disclosure provisions for electioneering communications, intending to fully comply with them so that full disclosure of its identity and activities as required by law would have been forthcoming. Record 30:8-9 (*AVC* ¶¶ 35-37). The three proposed ads all contained the disclaimer language required by 11 C.F.R. § 110.11. Record 30:36 (*AVC* ¶ 36); *see* JS-App. 13a-17a (ad transcripts). WRTL's electioneering communication activity would have triggered a "disclosure date" of August 15, requiring it to file a report of electioneering communication activity by 11:59 p.m. on August 16. Record 30:8 (*AVC* ¶ 34).

Broadcast advertisements are the most effective form of communication for a grassroots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message. Record 30:10 (*AVC* ¶ 51).

Using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option.[6] As of

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[5]The ads clearly referenced candidate U.S. Sen. Russell Feingold, who was running for reelection in the September 14 primary and November 2 general election. Record 30:4 (AVC ¶ 14); JS-App. 5a (FOF 4, 10-11). They were to be broadcast for a fee on television and radio within 30 days before the primary and within 60 days before the general election; referenced a clearly identified candidate for federal office; were "targeted"; would have been "publicly distributed" as of August 15; and would have cost (by payment or contract) at that time more than $10,000 for direct production costs and airtime. Record 30:7-8 (*AVC* ¶ 25-33).

[6]In response to a question from the district court at the preliminary injunction hearing as to why WRTL could not simply fund its grassroots lobbying through WRTL-PAC, WRTL moved for and was

(continued...)

August 6, 2004, WRTL-PAC had $13,766.90 in its account. This money was the only money that could be used for federal contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If WRTL-PAC funds had been used for the grassroots lobbying ads, those funds would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make. Record 20, Attachment 1 at 1-2 (*Lyons Affid.* ¶¶ 1-7).

The approximately $14,000 in funds in the WRTL-PAC account in early August of 2004 would not have been sufficient for the planned advertising expenditures. The projected cost of WRTL's planned grassroots lobbying campaign was $100,000. PAC money is difficult to raise, being subject to source, amount, and disclosure requirements, and WRTL believed that it could not raise sufficient funds in its PAC to fund the grassroots lobbying campaign. Record 20, Attachment 1 at 2-4 (*Lyons Affid.* ¶¶ 8-17).

WRTL is a nonprofit (§ 501(c)(4)), nonstock, ideological Wisconsin corporation, but it does not qualify for any exception permitting it to pay for its broadcast ads from corporate funds. Record 30:6 (*AVC* ¶¶ 20, 22-23); JS-App. 4a (FOF 1, 3).

The Federal Election Commission ("FEC") is the government agency charged with enforcing the relevant provisions of the Federal Election Campaign Act ("FECA"), as amended by BCRA, and applicable regulations. Record 30:6 (*AVC* ¶ 21); JS-App. 4a (FOF 2).

On July 28, 2004,WRTL filed its verified complaint and sought a preliminary injunction to permit continued

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[6](...continued)
granted leave to file the *Affidavit of Barbara L. Lyons* ("*Lyons Affid.*"), specifically addressing that issue, on August 10, 2004. Record 20 (and Attachment 1), 21.

running of its grassroots lobbying ads past the August 15th beginning of the electioneering communication prohibition period. Record 1, 4. A three-judge court was convened pursuant to BCRA § 403(a)(1). Record 3, 9, 10. WRTL's preliminary injunction motion was denied August 12, 2004, Record 23, with a *Memorandum Opinion and Order* issued August 17th. Record 26; JS-App. 4a.

Pursuant to WRTL's declaration that it would not continue broadcasting its three ads (*see* JS-App. 13a-17a) beyond August 15, 2004, absent injunctive relief, WRTL ceased broadcasting its grassroots lobbying ads because they were then prohibited and for fear of enforcement by the FEC against WRTL. Record 30:10 (*AVC* ¶ 52).

On September 16, 2004, the district court sua sponte ordered briefing on whether the *AVC* should be dismissed. Record 32. On March 14, 2005, WRTL moved for summary judgment. Record 41. On March 28, the FEC did the same. Record 43. The cross-motions were denied as moot in the dismissal order. Record 49, JS-App. 1a.[7]

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[7]The procedural nature of the district court's action requires examination. Cross-motions for summary judgment were fully briefed, Record 41, 44-47, but the court instead dismissed the case with prejudice and stated that the summary judgment motions were moot. Under Rule 12(b), however, when "matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." The court relied on materials outside the pleadings, dismissing the case with prejudice "[f]or the reasons set forth in th[e] Court's Memorandum Opinion and Order dated May 9, 2005 . . . ." JS-App. 1a. The May 9th *Memorandum Opinion and Order* said that the Court had considered "the entire record herein" and dismissed the case "for the reasons forth in its prior opinion." JS-App. 2a-3a. The prior August 17th opinion did fact-finding, relying on facts outside the pleadings submitted by the FEC, and held (a) that *McConnell* precluded as-applied challenges and (b) that WRTL's grassroots lobbying ads were in any event excluded because WRTL's

(continued...)

The *Order* and the *Memorandum and Order* dismissing this case were filed May 10, 2005. JS-App. 1a-3a. As noted, *supra* at note 7, the court did so both on the bases that (a) *McConnell* precluded all as-applied challenges and (b) in any event (based on factors beyond the communications at issue), WRTL's activity was the sort of activity targeted by Congress in BCRA and so should not be recognized for an exception to the electioneering communications prohibition. WRTL noticed appeal on

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[7](...continued)
other activities made the grassroots lobbying ads the sort of activity targeted by Congress:

> Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. . . . Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18). This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

JS-App. 8a-9a. Thus, the district court clearly relied on "matters outside the pleadings" and decided the case on the merits under summary judgment. So it is appropriate for this Court to go to the merits. Expedition and judicial economy also argue in favor of doing so. BCRA § 403(a)(4), 116 Stat. at 114. This Court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). Review is de novo. *See, e.g., Coward v. ADT Sec. Systems*, 194 F.3d 155, 158 (D.C. Cir. 1999).

May 12, 2005. JS-App. 33a. Probable Jurisdiction was noted on September 27, 2005.[8]

Summary of the Argument

The FEC insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not. This Court, however, did not preclude all as-applied challenges in *McConnell*, 540 U.S. 93. The language and analysis of *McConnell* indicate that this Court had no such intent, but rather that it was only considering a facial challenge and that it recognized that as-applied challenges were available to cure any overbreadth. Article III and this Court's prudential tenets also would have precluded the *McConnell* majority from considering future cases (especially by a different party and on additional constitutional grounds) or excluding future as-applied challenges.

Incumbent politicians should not be able to shield themselves from lobbying about upcoming votes in Congress through campaign finance regulations. The people are the sovereign in a republican form of government and have the inherent constitutional right to effectively participate in self-government, which is protected by the First Amendment rights of free expression, association, and petition. Grassroots lobbying by citizen groups is the essence of self-government and has nothing to do with elections. Grassroots lobbying has to do with holding *present* representatives accountable to the people when they are considering the exercise of governmental power. Electioneering has to do with who will be the *future* representatives. Thus, the electioneer-

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[8]This case is not moot for the reasons set out in the *Jurisdictional Statement*. JS 7 & nn.2 & 3.

ing communication prohibition cannot be constitutionally applied to the grassroots lobbying ads in this case or to grassroots lobbying generally.

Argument

I. *McConnell* Did Not, and Could Not, Bar As-Applied Challenges.

May a court in a facial challenge prohibit *all* future as-applied challenges to a statute? May it do so for all time, all parties, all fact situations, and all constitutional claims (even those based on rights not raised in the first case)? And did this Court actually do so in *McConnell*? 540 U.S. 93. WRTL believes not.

A. The FEC Seeks Exclusive Jurisdiction Over As-Applied Questions.

The FEC insists on having the exclusive right to consider and award or withhold as-applied exceptions to the electioneering communications prohibition. Although the FEC may consider as-applied challenges (by rulemaking and advisory opinions), it insists that an Article III court may not do so.

The FEC has authority to create by rulemaking additional exceptions, as applied to specific situations, to the electioneering communications prohibition. 2 U.S.C. § 434(f)(3)(B)(iv). It exercised that authority as applied to *MCFL*-type corporations, 67 Fed. Reg. 65203-07, 65211, over a year before this Court also decided that an as-applied exception to the electioneering communication provision was constitutionally required for certain nonprofit corporations identified in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986) ("*MCFL*"). *McConnell*, 540 U.S. at 209-11.

The FEC even considered an exception for grassroots lobbying, then decided that BCRA prohibited the exception. *See* 67 F. Reg. 65203. But BCRA's prime sponsors

proposed such an exception, believing that the FEC had the authority to make it and that such an exception was appropriate. *See infra* at note 19.

And the FEC made an exception when it said, in FEC Advisory Opinion 2004-31, that candidate Russ Darrow, Jr.'s name could be used in what were otherwise electioneering communications by the automobile dealerships bearing his name that were founded by him, but were now under the day-to-day control of his son, Russ Darrow III. *See* JS at 2.

But the FEC insists that an Article III court may not do the same. And the FEC's current insistence is despite its prior insistence in *McConnell* that as-applied challenges were the cure for perceived overbreadth.[9] Now it asserts the diametrically opposed position that the opportunity for such challenges is over, never to return, and the FEC has exclusive jurisdiction over as-applied questions. The FEC is wrong.

B. *Broadrick*, Article III, and Prudential Tenets Require As-Applied Challenges To Be Permitted.

In rejecting a facial challenge to the corporate prohibition on electioneering communications in *McConnell*, this Court cited *Broadrick*, 413 U.S. 601, for the proposition that facial overbreadth must be substantial before a

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[9]In the district court in *McConnell*, the FEC conceded the overbreadth of the electioneering communication provision to be up to six percent, but argued that later as-applied challenges were the only solution for such overbreadth. Redacted Brief of Defendants at 131, 161, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582). In this Court in *McConnell*, the FEC argued the same. Brief for the FEC (Final Version) at 105-06, *McConnell*, 540 U.S. 93 (02-1674). Intervenors Senators McCain and Feingold and other prime BCRA sponsors also argued for leaving as-applied challenges until later. [Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674).

facial challenge may succeed. *Broadrick* recognized (as did *McConnell* by relying on it) that where a facial challenge fails "whatever overbreadth may exist should be cured through *case-by-case analysis* of the fact situations to which its sanctions, assertedly, *may not be applied.*" *Broadrick,* 413 U.S. at 615-16 (emphasis added).

The availability of as-applied challenges is required by Article III of the U.S. Constitution, which prevents federal courts from deciding cases not before them. *See, e.g.*, Charles Alan Wright, *Law of Federal Courts* at 54-59 (1983). Based on Article III and prudential considerations, this Court has created avoidance principles summarized by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The second Article III-based principle is that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citation omitted). The first prudential principle is that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 347 (citation omitted). *McConnell* endorsed these rules[10]

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[10]*McConnell* adhered to these avoidance principles as follows:

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting).

McConnell, 540 U.S. at 192-93.

and could not have decided the present as-applied challenge. It was not before the Court.[11]

C. *McConnell*'s Language Presupposed As-Applied Challenges.

McConnell also specifically indicated that the usual as-applied challenges must be permitted. This Court differentiated between "genuine issue ads" and "sham issue ads," noting that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," but finding that "the vast majority of ads clearly had such a purpose." *Id.* at 206. The Court acknowledged that "[t]he interests that justify the regulation of campaign speech *might not apply* to the regulation of genuine issue ads," *id.* at 206 n.88 (emphasis added), but this issue was not resolved in *McConnell's* facial analysis. Thus, *some* genuine issue ads were swept up in the prohibition and an as-applied challenge is the proper way to sort them out.

The district court, however, relied on *McConnell's* footnote 73 for the proposition that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." JS-App. 2a. Footnote 73 noted that there were two definitions of "electioneering communication" in BCRA—the primary one that this Court upheld and a backup definition—but said that the Court did not need to reach the constitutionality of the backup definition because "we uphold all applications of the primary definition and accordingly

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[11]This Court sometimes declares matters nonjusticiable, but that is not at issue here, and the Court clearly articulates when matters are nonjusticiable. *Compare Davis v. Bandemer*, 478 U.S. 109 (1986) (partisan gerrymandering claims held justiciable) *with Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality said nonjusticiable).

have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The district court misunderstood "all applications" to mean all applications of *the prohibition* of corporate funding of electioneering communications.

But in footnote 73 this Court was considering alternative *definitions* of electioneering communication and the approved primary definition had various *applications in the statute*, i.e., to disclosure requirements for different entities and in different situations, 2 U.S.C. § 434(f), to disclaimer requirements, 2 U.S.C. § 441d, and to the prohibition on the use of corporate or labor union funds. 2 U.S.C. § 441b. The primary definition was upheld in all *these* "applications." As to various *factual* applications of the corporate ban on electioneering communications in *McConnell's facial* challenge, this Court had two choices, either to uphold this provision on its face as to *all* applications (subject to later as-applied challenges), or to strike it down in all its applications, based on whether it's overbreadth was "substantial." The Court chose the former. 540 U.S. at 207.

This would explain this Court's statement in its Title V analysis parenthetically describing the Court's facial upholding of the electioneering communication prohibition as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey a message of support or opposition)." *Id.* at 239 (emphasis in original). By likening *McConnell*'s decision on BCRA § 203 (electioneering communication prohibition) to BCRA § 504 (broadcaster reports), this Court was indicating that as-applied challenges remained open :

> Moreover, candidates (or other speakers) whom § 504 affects adversely in this way (or in other ways) remain free to challenge the lawfulness of FCC implementing regulations and to challenge

> the constitutionality of § 504 as applied. To find that the speech-related interests of candidates and others may be vindicated in an as-applied challenge is not to "ignor[e]" those interests.

540 U.S. at 244.

Demonstrating that as-applied challenges were appropriate, this Court in *McConnell* actually decided the first as-applied challenge, i.e., whether there must be an exception to the prohibition for electioneering communications by *MCFL*-type corporations, which could not be prohibited because they pose none of the corruption risks represented by business corporations. *Id.* at 209-11. *McConnell* nowhere said this could be the only as-applied exception.

In sum, this Court in *McConnell* did not foreclose as-applied challenges to the prohibition on corporate expenditures for electioneering communications. Nor may all future as-applied challenges be precluded. Reason and experience teach that no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts. This Court has often recognized this practical limitation (and the ever-present possibility of future as-applied challenges) with the "on this record" phrase. *See, e.g., Buckley v.* Valeo, 424 U.S. 1, 4, 72 (1976); *MCFL*, 479 U.S. at 252 n.6. Thus, this Court may consider this as-applied challenge.

II. An Exception for Genuine Grassroots Lobbying Is Constitutionally Required.

Should incumbent politicians be able to insulate themselves from lobbying about upcoming votes in Congress through campaign finance regulations? WRTL believes not and seeks relief as to (1) its three broadcast ads specifically *and/or* (2) grassroots lobbying generally.

A. The Constitution Specifically Protects Grassroots Lobbying.

The people are sovereign. U.S. Const. preamble; *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). In a constitutional republic, government is restricted to the powers expressly granted by the people. U.S. Const. amend. X. The people created legislators to represent them, U.S. Const. art. I, § 1; art. IV, § 4, and amended the Constitution to require that Senators be "elected by the people." U.S. Const. amend. XVII. The people mandated Congress not to restrict their rights to speak, associate,[12] and petition in the exercise of the people's sovereign right to participate in representative self-government. U.S. Const. amend. I.

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777.

While the individuals who make up WRTL could engage in electioneering communication, 2 U.S.C. § 434(f) (requiring only disclosure if spending exceeds $10,000 in a calendar year), when they form themselves into an effective advocacy group for lobbying, their lobbying

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[12] "[T]he First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas . . . ." *Buckley*, 424 U.S. at 16 (citations and quotation indicators omitted).

through broadcast ads is prohibited for up to 90 days during an election year. Citizen groups formed under the right of association are an essential component of democracy in action. In *Buckley*, this Court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas." *Buckley*, 424 U.S. at 15."[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25.[13] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic by permitting amplified individual speech. *Id.* at 22.

Grassroots lobbying is also protected by rights not considered in *McConnell*, i.e., the inherent right of the people to participate in self-government and the express First Amendment right to petition, along with a line of cases protecting corporations' right to contact both legislators and the public about pending legislative and executive matters.

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[13]When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But when speech is limited, as here, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-59 (2001).

The right of corporations to petition both the legislative and executive branches was recognized in *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 135 (1961). This Court held that attempts to influence the passage or enforcement of laws were constitutionally protected, essential to representative government, and could not constitute a violation of the Act:

> In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 137-38. *See also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government").

In *Bellotti*, 435 U.S. 765, this Court applied the right of petition to corporations which sought "to publicize their views on a proposed constitutional amendment . . . to be submitted . . . as a ballot question," *id.* at 769, and held that this was constitutionally protected. *Id.* at 776-78, 790-96. *Bellotti* noted that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," and concluded that "there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity." *Id.* at 791 n.31.

The overarching principle of these cases is the right of the people to lobby incumbent politicians about their

conduct in office.[14] Where the express right of petition and the inherent necessity of the people's participation in self-government are added to the rights of free expression and association, the electioneering communication prohibition must yield to the weight of constitutional necessity and allow an exception for grassroots lobbying.

Recently there was a great debate on reforming Social Security. President Bush made speeches across the nation to generate support so that people would pressure their representatives to support his plan. This was grassroots lobbying. Senators, Representatives, and political party leaders similarly tried to sway public opinion for or against the President's viewpoint. The people, through nonprofit corporate citizen groups, also lobbied.[15] This is the work of a vibrant republic, with active involvement of the people. But what if an election were pending within 60 days as this debate occurred?[16]

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[14]It should be noted that the only reason that the present issue about grassroots lobbying arises is because an incumbent politician chooses to run again. Choosing to run for reelection is a benefit to the incumbent, now candidate, because he or she has the possibility (perhaps even the likelihood, given the benefits of incumbency) of being reelected and exercising government power in the future. However, if the electioneering communication provision bans grassroots lobbying, the incumbent's interests are served, but not the people's. In the present case, Sen. Kohl could be lobbied, but not Sen. Feingold. So incumbents who choose to run again gain a special exemption from the attempt by the people to influence them through grassroots lobbying. This goes a step beyond anything considered in *McConnell*. And the problem is compounded because members of Congress often push important legislative matters to the end of the session, which will often be in the blackout period. *See infra* note 16.

[15]For example, AARP was grassroots lobbying against the President's plan. *See* http://www.aarp.org/ (visited March 7, 2005). The 60 Plus Association was grassroots lobbying for the President's plan. *See* http://www.60plus.org/ (visited March 7, 2005).

[16]In *McConnell*, the ACLU provided a summary Chart of "Bills of

(continued...)

All but the people could continue using the most effective means to do grass-roots lobbing—broadcast media.

B. Grassroots Lobbying Differs From Electioneering.

1. There Is a Distinction Between Grassroots Lobbying and Electioneering.

This is the first instance in which this Court has to specifically address the constitutional distinction between grassroots lobbying and electioneering in the context of campaign finance laws because BCRA's electioneering communication prohibition makes no such distinction.

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[16](...continued)
Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." Joint Appendix at 622-26, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*) and made the following observations about pre-election legislative activity:

> [E]lection years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration in the midst of the pre-election period. . . . During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* [Chart]. Thus, it is not unusual for the ACLU's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election.

Brief of Appellant at 12-13, *ACLU v. FEC* (No. 02-1734) (consolidated with *McConnell*). The Chart is included as an appendix to the *Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* herein. In addition, the Chamber's brief provides details of the roll call votes in prohibition periods in the 108th Congress. *Id.* at 6. A longstanding practice in Congress is to attach riders to appropriation bills, which are considered in the fall prohibition periods. Movement of controversial legislation to prohibition periods may reasonably be expected because less opposition can be generated at such times.

The Internal Revenue Code, however, does so. The Internal Revenue Code provides that:

> [A] "Grass roots lobbying communication" is "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof" and has three "required elements:" (1) "refers to specific legislation," (2) "reflects a view on such legislation," and (3) "encourages the recipient of the communication to take some action with respect to such legislation."

26 U.S.C. § 56.4911-2(b)(2)(i)-(ii). Advocacy groups such as WRTL that are exempt under 26 U.S.C. § 501(c)(4), may spend an unlimited amount of their general treasury funds on lobbying, either "grass roots lobbying" or legislative lobbying.[17] Charities exempt under 26 U.S.C. § 501(c)(3), however, may spend only an insubstantial amount on lobbying of any kind.

Under the IRC, electioneering is referred to as "political intervention" and is more severely restricted. Nonprofit corporations under § 501(c)(3) may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office," *id.*,[18] while advocacy groups under § 501(c)(4) may do so, but may spend only an insubstantial amount on

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[17]"Grass roots lobbying" includes "(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof," while "legislative lobbying" refers to "(B) any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official or employee who may participate in the formulation of the legislation." 11 C.F.R. § 4911(d)(1).

[18]The unique problems that the prohibition imposes on § 501(c)(3) groups, with respect to grassroots lobbying, are addressed in the present case by the *Brief of OMB Watch [et al.] as Amici Curiae in Support of Appellant.*

political intervention. Political intervention is dealt with under the term of "exempt function," in 26 U.S.C. § 527(e)(2), and:

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

So the IRC distinguishes between lobbying, which is seeking to influence legislation, and political intervention, which is seeking to influence elections.

While the term "influencing" has not been construed in the IRC context, FECA contains a similar definition of electioneering by defining political "contributions" and "expenditures" as ones made "for the purpose of influencing any election for Federal office." 2 U.S.C.§§ 431(8)(A)(i) and 431(9)(A)(i). Because of the vagueness and potential overbreadth of this phrase, this Court has construed "influence" to require express advocacy of the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at 79-80 (construing "purpose of influencing," in §§ 431(8) and (9), to require express advocacy), and *McConnell*, 540 U.S. at 190-92. *See also Buckley*, 424 U.S. at 42-44 (construing "relative to" to require express advocacy) and *MCFL*, 479 U.S. at 248-49 (construing "in connection with an election," in the prohibition at § 441b, to require express advocacy). As a result of these constructions, FECA clearly applied only to electioneering and not grassroots lobbying prior to enactment of BCRA.

Central to these "express advocacy" holdings, and to the speech protections of the First Amendment generally, was the idea that the *speaker* must be able to know,

based on the meaning of the words he is speaking, which side of the line the speaker is on. Requiring "explicit words" of advocacy of the election or defeat of a candidate does this. *Buckley*, 424 U.S. at 43. Thus, the speaker is not left to "hedge and trim," wondering how the hearer might interpret the message based on factors external to the communication itself. *Id. McConnell* endorsed the express advocacy construction of the language at issue in *Buckley* and *MCFL* to avoid vagueness and overbreadth. 540 U.S. at 192.

BCRA added the electioneering communication provision, which applies to certain communications that "refer[] to a clearly identified candidate for Federal office," without any further content requirements. 2 U.S.C. § 434(f)(3)(A)(i)(1). *McConnell* upheld this provision on its face because it was not vague or overbroad. 540 U.S. at 194. It was not vague because "clearly identifying a candidate" is not vague. *Id.* (quoting definition). And it was not overbroad because electioneering communications generally were found to be the "functional equivalent of express advocacy." *Id.* at 206. However, since effective grassroots lobbying requires reference to an incumbent, who may be a candidate, this provision, on its face, encompasses grassroots lobbying, and this case presents the need to distinguish, for purposes of campaign finance laws, between grassroots lobbying and electioneering.

The distinction between grassroots lobbying and electioneering has been discussed in campaign finance cases, but has not yet been definitively decided. Justice Stevens raised the distinction in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), where he said that "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id* .

at 678 (Stevens, J., concurring) (emphasis added). Justice Stevens' view seems to have been carried over to his opinion for the Court in *McConnell* where, in footnote 88, the Court reiterated that, while government may regulate electioneering, it may not regulate "genuine issue ads" and distinguished *McConnell* from *Bellotti*, 435 U.S. 765, and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *McConnell*, 540 U.S. at 206 n.88. Justice Kennedy, moreover, argued in *McConnell* that corporations ought to be able to do both electioneering and lobbying. 540 U.S. at 764 (Kennedy, J., dissenting).[19]

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[19]The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying, proposing to the FEC the following exception to the prohibition on electioneering communications:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords at 10 (copy on file with authors) (attached to Letter from Sen. John

(continued...)

2. Genuine Grassroots Lobbying Is Not Sham Issue Advertising.

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered there were the "functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grassroots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. Or is grassroots lobbying a "genuine issue ad" which may not be prohibited.

Grassroots lobbying ads are not "sham issue ads" and have nothing to do with elections. They are about legislative action and effective participation by the people in self-government. Lobbying seeks to influence the exercise of government power by incumbent officeholders today, while electioneering seeks to influence who will exercise governmental power in the future. The people's right to influence their representatives on pending legislative matters today is more pressing and potentially more

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[19](...continued)
McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) (copy on file with authors). Both documents are available at the FEC's website, http://www.fec.gov/law/RulemakingArchive.shtml (select "Electioneering Communications" then "Comments on This Rulemaking").

This proposal by the prime sponsors brings the issue to a very fine point: Assuming a grassroots exception that clearly identifies a candidate, e.g., "Your Senator," is there a constitutional justification for forbidding a citizen group to simply name its Senator? Is the incremental burden on the citizen group narrowly tailored to a compelling interest? Naming the candidate is necessary, as Judge Leon noted from the *McConnell* record, *infra* at note 31, and is easily justifiable on the basis of the people's exercise of their sovereignty in a republican form of government and their express right to petition, which includes grassroots lobbying.

important than who might be their representative next year.

Further, if this Court were to accept the proposition that the people may be silenced now on upcoming votes in Congress because it might affect future elections, where would it end? Based on such a proposition, grassroots lobbying could be banned at all times because it might always have a remote effect on elections. There would be no constitutional way to limit such a ban to 30 plus 60 days in a year, or the 80 unbroken days in this case.

Throughout the *McConnell* litigation, grassroots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grassroots lobbying must be excluded from the "sham issue ad" category. He found that grassroots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, *genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. See* Findings 368-73 (providing examples of legislation-centered advertisements that do

> not promote, support, attack, or oppose the election of a federal candidate).

McConnell, 251 F. Supp. 2d at 802-03 (Opinion of Judge Leon) (emphasis added except as to "*unrelated*"). Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grassroots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.[20]

3. Grassroots Lobbying Does Not Implicate *McConnell*'s Concerns.

Grassroots lobbying does not implicate *McConnell*'s expressed concerns about "sham issue advocacy." 540 U.S. at 132. *McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." *Id.* at 126.

First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples), 196-97 ("concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.* at 126, and *McConnell* provided an immediate example of what the Court meant by that: "Little difference existed, for example, between an ad that urged viewers to 'vote

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[20]The *Brief of Alliance for Justice, as Amicus Curiae In Support of Appellant* herein provides a number of concrete examples of ads that would not be "sham" ads if run during prohibition periods. *See id.* at Part II.A. Other examples are in the *Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant* at Part I.

against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
>
> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

540 U.S. at 193 n.78. This Court approved BCRA's solution of requiring disclosure and eliminating the use of corporate or labor union money for such ads, except as applied to *MCFL*-type corporations, which could not be prohibited from using corporate money for "electioneering communications" because such corporations do not pose the corruption risks represented by business corporations. *Id.* at 209-11 (creating the first as-applied exception to the prohibition).

Grassroots lobbying ads implicate none of these concerns. Because WRTL does not challenge the dis-

claimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system would be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue. And to the extent there is a scintilla of perceived support or opposition to a candidate, a remote possibility necessitated by the people's sovereign right to participate in representative government, the people, with full disclosure as to the messenger, can make the ultimate judgment. "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 792 n.31 ("The First Amendment rejects the 'highly 'paternalistic' approach . . . .").

And there will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." *Id.* at 206. As may be seen in the samples offered by WRTL, grassroots lobbying ads focus on passing or defeating pending legislation, not electioneering, and are of no (or only de minimis) value for the purposes of opposing or supporting candidates. But they are essential to self-government.

Further, the desirability of a "bright-line rule" does not defeat this as-applied challenge. This Court has already decided that where constitutional justification is absent, the "desire for a bright-line rule. . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL* , 479 U.S. at 263 (emphasis in original).[21]

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[21]In any event, the Court could adopt a bright-line test for grassroots lobbying that is every bit as bright as the exception for

(continued...)

4. If There Are Residual Concerns about Using Corporate General Treasury Funds for Grassroots Lobbying, a Segregated Bank Account Could Be Used.

The one possibly perceived residual advantage of requiring WRTL to do its grassroots lobbying through a PAC is that the use of donated corporate money would be eliminated.[22] In its strict scrutiny analysis, this Court in *McConnell* relied on the interest in regulating corporations with respect to candidate elections for the compelling interest prong. 540 U.S. at 205 (both "corporate form" advantage and "circumvention" are mentioned, but only as to "electoral involvement," which is absent here).

There is no "corporate form" compelling interest with respect to petitioning government (and consequently no "circumvention" interest), because corporate money may constitutionally be used for petitioning legislative and executive branches and the public about legislation. *See supra* at 18-18. Strict scrutiny requires a sufficient nexus between the sort of grassroots lobbying herein and candidate elections for the compelling interest in regulating corporations applicable to candidate elections to even

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[21](...continued)
MCFL-type corporations created in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grassroots lobbying can be neatly cabined without placing any burden on the courts or the FEC.

[22]The PAC option would also impose a $5,000 annual contribution limit on donations to the PAC, but contribution limits on organizations engaged in lobbying to support or oppose ballot measures (i.e., legislation) violates First Amendment rights of expression and association. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Given the extremely low likelihood that genuine grassroots lobbying would have a cognizable effect on an election, and given the offsetting self-governance interest of the people, there is no constitutional justification for contribution limits in this context.

apply. There is, however, an insufficient nexus here.[23] So there is no compelling interest to justify applying the prohibition on use of corporate funds to grassroots lobbying.

There is also no compelling interest in regulating corporations even as to candidate elections with respect to *MCFL*-type corporations. Although WRTL does not qualify for the exception to the prohibition (11 C.F.R. § 114.2(b)(2)) as a "qualified nonprofit corporation,"under the strict wording of 11 C.F.R. § 114.10,[24] Record 30:6 (*AVC* ¶ 23); JS-App. 4a (FOF 3), WRTL is in fact quite like an *MCFL*-type corporation because it is an ideological, nonstock, nonprofit (§ 501(c)(4)) corporation. Record 30:6 (*AVC* ¶¶ 20, 22); JS-App. 4a (FOF 1).

The fact that a corporation does not meet "qualified nonprofit corporation" status, because of some minimal business activity or receipts from corporations, should not matter for present purposes, however, because corporate money may be used for grassroots lobbying anyway. *See* 18. So the lack of corruption threat attributed to *MCFL*-

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[23] *See, e.g., Riley v. National Federation of the Blind*, 487 U.S. 781, 793 & n.7 (1988) ("there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent" and "[e]ven if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous").

[24] 11 C.F.R. § 114.10(c) follows, in a somewhat wooden way, the requirements for the *MCFL*-type corporation created by this Court in *MCFL*, 479 U.S. at 263-64, by creating an exception for ideological, nonstock, nonprofit (§ 501(c)(4)) corporations that have no business income and receive no corporate contributions. The regulation makes no provision for de minimis business income (especially of the sort related to the organization's mission, e.g., book sales related to its issues) or de minimis corporate contributions, as have other federal courts. *See* note 34 (listing cases recognizing corporations as *MCFL*-type despite such de minimis activity).

type corporations should be attributed to WRTL, even if it has receipts from business corporations.

Alternatively, WRTL would be willing to make disbursements for electioneering communications only "out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens, nationals, or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications." 2 U.S.C. § 434(f)(2)(E); 11 C.F.R. § 104.20(c)(7). This would eliminate all concerns about the use of business corporation funds for electioneering communications. As noted in the complaint, Record 30:13 (*AVC* at ¶ 67):

> The only remaining restrictions on PACs that would not apply to disbursements for grass-roots lobbying electioneering communications made from a segregated bank account are (a) the annual PAC contribution limit and (b) the requirement that a corporation first acquire "members" and then solicit funds only from these members. 2 U.S.C. § 441b(b)(4)(C). But as noted above, contribution limits are unconstitutional in the context of grass-roots lobbying because there is no potential for corruption, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), and any donors contributing in excess of $1,000 to the account would be disclosed to the public.[25]

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[25]Further discussion of this alternative may be found in the *Brief of Alliance for Justice, as Amicus Curiae in Support of Appellant* herein at Parts III and V. The *Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellant* also discusses this alternative at Part II.C.

C. WRTL's Ads Are Not Electioneering.

1. WRTL's Ads Are Not the "Functional Equivalent of Express Advocacy."

Furthermore, WRTL's three grassroots lobbying ads[26] are not express advocacy or its functional equivalent. In making this determination, the text of the ads themselves must be examined, not external factors. *Buckley*, 423 U.S. at 43 (express advocacy is "limited to *communications* that include *explicit words* of advocacy . . ." (emphasis added)). The ads do not, of course, contain explicit words expressly advocating the election or defeat of a clearly identified candidate, nor are they the functional equivalent.

The sole focus of the ads was imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL. The ads asked for calls to *incumbent* Senators who clearly had power to immediately affect the filibuster activity. These are unlike the "sham issue ads" that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past.

The only reference to Sen. Feingold was in the closing call to his constituents to contact him and ask him to oppose the filibusters. As Judge Leon noted, even the *McConnell* defendants' own expert concluded that an ad mentioning a candidate's name is a genuine issue ad, if "the body of the ad has no referent to [a candidate] whatsoever [and] the only referent to [the candidate] is the call line." 251 F. Supp. at 795.

WRTL's ads asked constituents to call *both* Sen. Kohl and Sen. Feingold, lessening the focus on Sen. Feingold

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[26]Note 4, *supra*, discusses details about of the current ads that indicate that they are genuine grassroots lobbying communications, i.e., pure issue ads, and not electioneering.

even more and indicating that the issue was filibustering, not Sen. Feingold. The ads mentioned no election, candidacy, or political party, and said nothing about the Senators' character, actions, or fitness for office. The ads didn't even say whether the Senators had both supported or opposed the filibuster or split on the issue. There were no words that promoted, supported, opposed, or attacked either Senator.

The ads dealt with non-candidate Kohl and candidate Feingold equally, not singling Sen. Feingold out in any way. The ads dealt with a long-time, natural concern for WRTL, which would like President Bush's judicial nominees to be appointed, so there is no question of a made-up issue. In fact, WRTL ran these same ads outside the blackout periods during which time there is no congressional or court finding that there is any equivalence with express advocacy. And the ads dealt with an unprecedented issue of vital national importance that was just then coming to a head at the end of the terms of President Bush and the Congress, which facts were a matter of public record and beyond WRTL's control.

In sum, WRTL's ads were not of the "functional equivalent of express advocacy." Prohibiting WRTL from running them with its general treasury funds would therefore be unconstitutional.[27]

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[27]The unique details of WRTL's ads do not reach the outer limits of what the Constitution requires. For example, WRTL believes that there is no constitutional justification for prohibiting a citizen group from stating a legislator's position (for, against, or undecided) on a pending legislative matter in a grassroots lobbying communication.

But such questions are not necessary to decide on this record, although the Court may wish to cite them if the Court finds them essential to its decision in the manner that it did in *MCFL*. 479 U.S. at 263-64. But even without so doing, subsequent as-applied cases could refine the scope of the constitutional protection in finer detail in the same way that lower courts have found that de minimis

(continued...)

2. Other Activity Does Not Create Functional Equivalence.

The district court said that, even if it could consider an as-applied challenge, it could also consider whether the proposed ads would affect elections by looking at external factors, and WRTL would lose because it was really just trying to defeat one of the two senators named. JS-App. 8a-9a.

The district court found, JS-App. 9a, that "candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue," JS-App. 5a (FOF 5), WRTL-PAC "endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority," JS-App. 5a (FOF 7), "[i]n a news release . . . WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees," JS-App. 5a (FOF 8), "WRTL has used a variety of non-broadcast communications to convey its criticisms of Senate filibusters against judicial nominees in the months leading up to August 2004." JS-App. 51 (FOF 9).

The district Court said in effect that if you exercise one constitutional freedom, such as speaking out on a public issue or using a PAC to oppose a candidate, then you give up your constitutional right to do grassroots lobbying. That is an unconstitutional condition, i.e., if you want this benefit you must give up that right (*see, e.g., Healy v. James*, 408 U.S. 169, 180-84 (1972); *Speiser v.*

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[27](...continued)
business income or corporate donations do not prevent a corporation from qualifying as an *MCFL*-type corporation if they would otherwise qualify. *See FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 292 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994).

Randall, 357 U.S. 513, 518 (1958)), in this case requiring a tradeoff of constitutional rights instead of benefits. The district court also said in effect that if you think you may ever want to participate in representative government by petitioning your representative, make certain you never say anything about the issue first, make sure your PAC never supports or opposes any of your representatives, and if you want to make an issue of something that other people care about, so that it becomes a campaign issue, forget it.

This position is hostile to the rights of free expression, association, and petition, and to a republican form of government and would seriously undermine the ability of the people to participate in their government. And the very fact that an incumbent candidate makes a pending legislative action a campaign issue, using the bully pulpit of public attention resulting from his or her candidacy, increases, rather than diminishes, the constitutional interest of the people in participating in that public debate. Candidates may not be granted a veto over the people's right to lobby incumbent politicians about upcoming votes in Congress by making that issue a campaign issue.

The district court's position is also contrary to clearly-established law, which defines both independent expenditures and electioneering communications based on what the communication itself says, not on what the organization says elsewhere, or what its PAC says, or what else an organization does. These are considered in turn.

An independent expenditure is determined by looking to the communication itself, not extrinsic factors. "'Independent expenditure' means an [uncoordinated] expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17). "'Clearly identified' means that—(A) the name

of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). So whether a communication constitutes an independent expenditure turns solely on whether the communication *itself* contains explicit words expressly advocating a clearly identified candidate's election or defeat. What an organization's PAC said, what the organization's press releases said, and whether some candidate cares about the same issue so as to make it a campaign issue are not part of the analysis. There is express advocacy, or there is not, based on the communication itself. *Buckley*, 423 U.S. at 43 (express advocacy "limited to communications that include explicit words of advocacy . . . .").

As to electioneering communications, the law again requires examination of the communication itself, not extrinsic factors. "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3). *See* JS-App. 19a-21a; *see also* JS-App. 24a (regulatory definition, 11 C.F.R. § 100.29). Nowhere in the definition is there any instruction to see whether the organization's PAC said anything or what the organization's press releases said. In fact, *McConnell* upheld the definition because it introduced none of the vagueness posed by the statute at issue in *Buckley*. *McConnell*, 540 U.S. at 192, 194. The problem identified in *Buckley* was how to separate electioneering from participatory democracy. *Buckley* noted that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42. And this Court pointed out that there could not be a test that depended on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker,

> in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (internal quotation marks and citation omitted).

As to PAC activity, the very statutory *prohibition* at issue in this case, expressly *excludes* any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) ("*shall not include* . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" (emphasis added)). The courts have never held that what a citizen group says through a PAC is attributable to its connected corporation or is a factor in determining whether a communication made with general treasury funds constitutes express advocacy, or its functional equivalent.

In *MCFL*, MCFL had a PAC, 479 U.S. at 255 n.8, but this Court never asked what the PAC had said or done in its analysis of whether MCFL's communication contained express advocacy. *Id.* at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But this Court never considered any such activity in determining whether there was an independent expenditure. Instead the Court noted that the "Special Edition" of MCFL's *newsletter* said to vote prolife and then identified which candidates were prolife. *Id.* at 249. So the Court said that if A=B and B=C, then A=C. But the sole focus was on the particular *communication* in the newsletter and what its words said, not MCFL's other activities.

If what a PAC says is attributable to a connected corporation itself, then every PAC's independent expenditure and electioneering communication would constitute a violation *by the corporation* of the prohibition on corporate independent expenditures and electioneering communications at 2 U.S.C. § 441b. The PAC is legally and logically separate from the corporation. It's actions are not attributable to its connected corporation.

Buckley and *McConnell* both stand for the proposition that express advocacy and its functional equivalent must be determined by a bright-line test to protect fundamental freedoms and core functions of participatory democracy. There can be no vagueness, and introducing external factors, such as things said in an unrelated prior press release, reintroduces vagueness.

D. Other Options Are Inadequate.

The district court acknowledged that the loss of First Amendment freedoms is irreparable harm, but declared that the harm "is not nearly so great as plaintiff argues" because other means of communication are open and there is the option to use PAC funds. JS-App. 9a-10a.

1. The PAC Option Imposes an Unconstitutional Burden on Grassroots Lobbying.

Of course, Congress may tell WRTL how to run its ads only if the electioneering communication prohibition is narrowly tailored to a compelling state interest *as applied* to grassroots lobbying. Until that is demonstrated, and the burden for demonstrating it is on the FEC, *see Austin*, 494 U.S. at 657-58, WRTL is constitutionally harmed if it must confine itself to PAC funds.[28]

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[28]The FEC argued below that *McConnell* held that a PAC option was a constitutionally sufficient means for corporations to pay for

(continued...)

The district court also said that *McConnell* "has already determined that the provisions of the BCRA serve compelling government interests." JS-App. 11a. That was as-applied to sham issue ads, not grassroots lobbying. As noted above, *supra* at 18, corporations are free to engage in lobbying, so the exclusion of corporate funds is not a compelling interest as to grassroots lobbying. Since WRTL challenges only the prohibition, not the disclaimer and disclosure requirements relating to electioneering communications, the public would be fully informed.

Moreover, on the facts of this as-applied case, the PAC alternative is simply inadequate. WRTL had only a

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[28](...continued)
election-related advocacy, but that assertion ignores the fact that *McConnell* never held that "genuine issue advocacy" in the form of grassroots lobbying constitutes election-related advocacy. Rather, *McConnell* applied *Broadrick*'s substantial overbreadth facial-challenge test and left for another day the sort of as-applied challenge brought today. To the extent that *McConnell* considered the PAC option sufficient, it did so only in the context of the "sham issue ads" that it considered to be the "functional equivalent of express advocacy," which is not the case with the present ads.

The district court's reliance, JS-App. 10a, on *FEC v. Beaumont*, 539 U.S. 146 (2003), was wholly inapposite because *Beaumont* only said that the PAC option was adequate with respect to contributions, for which this Court has always applied a lower standard. By contrast, in *MCFL* , the Court said that the PAC option was not adequate with respect to independent expenditures (containing express advocacy) for *MCFL*-type corporations and catalogued some of the burdens inherent in PAC funding. *MCFL*, 479 U.S. at 252-55. Justice O'Connor concurred, highlighting especially the PAC-option burdens on MCFL. *Id.* at 265 (O'Connor, J., concurring) *Austin* also noted that requiring the PAC option is a burden on First Amendment rights that must be narrowly tailored to a compelling governmental interest. *Austin*, 494 U.S. at 657-58. Applying the PAC option to WRTL's proposed ads, or to grassroots lobbying generally, is not narrowly tailored to a compelling governmental interest. The FEC has failed its burden to prove it so under strict scrutiny.

limited time to engage in grassroots lobbying in favor of an up-or-down vote on judicial nominees. A lost opportunity at the critical time is an opportunity lost forever. These were highly important matters to WRTL and its members and were not "mere" theoretical deprivations of First Amendment rights to speak on matters of public concern.

When a legislative issue arises on short notice, as it did here, there simply is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of first acquiring FECA-compliant "members" (who must fit certain criteria to qualify for solicitation and may not be solicited for PAC money until they respond to a prior solicitation to become members of the organization and the organization responds indicating acceptance)[29] and then raise PAC money from the members through the multiple appeals required for successful fundraising. Record 20:3 (*Lyons Affid.* ¶ 9).

And even though WRTL had a PAC already, the PAC alternative was untenable for there was inadequate time to raise sufficient funds by appeals to existing members (usually multiple efforts are required), *id.*, and taking the

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[29]A "membership corporation," 11 C.F.R. § 114.1(e)(1), such as WRTL, may not solicit contributions to its PAC from non-members (unless they are "executive or administrative personnel, and their families"). 11 C.F.R. § 114.7(a). To acquire "members," a membership corporation must comply with 11 C.F.R. § 114.1(e)(1), i.e., have a prescribed organizational structure, have prescribed language in its organic documents, "expressly solicit[] persons to become members," and "expressly acknowledge[] the acceptance of membership," and comply with § 114.1(e)(2), i.e., the member must have "some significant financial attachment to the membership organization" (described), or "pay membership dues at least annually," or "have a significant organizational attachment to the membership organization" (described). While a membership corporation may solicit members as desired, other corporations may only solicit their employees for a PAC contribution twice a year. 11 C.F.R. § 114.6.

multi-step process of recruiting new members, expressly acknowledging their acceptance as members, and then soliciting them for contributions. *See supra* note 29. The PAC alternative in such situations is effectively a complete ban and also amounts to having to obtain an advance government license before being permitted to speak, which is a prior restraint. And as discussed above, the governmental interests advanced by use of a PAC are inapplicable on the facts of this as-applied challenge.[30]

2. Other Forms of Communication Are Inadequate.

Other alternatives, such as newspaper ads and letters, are also inadequate. The obvious reason why Congress banned only broadcast electioneering communications ads is that they are the most effective, which is why WRTL chose broadcast ads. Barbara Lyons, the long-time executive director of WRTL, Record 30:15 (*AVC* verification statement) with many years of experience in promoting WRTL's issues, verified that broadcast advertising is the most effective means of grassroots lobbying for WRTL and that "non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message." Record 30:10 (*AVC* ¶ 51). The FEC has not shown otherwise, and it is not the role of government to tell citizens how best to communicate: "The First Amendment protects [WRTL's] right not only to advocate [it's] cause but also to select what [it] believe[s] to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The most effective means of reaching constituents quickly (often on very short notice as legislative issues arise

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[30]As discussed in *Brief of OMB Watch [et al.] as Amici Curiae in Support of Appellant*, nonprofits organized under IRC § 501(c)(3) are not permitted to even have a PAC, making grassroots lobbying in prohibition periods a total and absolute ban for them.

abruptly, e.g., by amendment to an existing bill) and getting their attention is by broadcast ads on their favorite shows and commuting programs, not in dwindling-circulation newspapers and time-consuming direct mail.

3. Requiring That a Group Not Incorporate Burdens the Freedom of Association.

The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. *See Buckley*, 424 U.S. at 22 (association permits amplified speech). The most effective form of existence for these groups is the nonprofit corporate form, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one's right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group's speech, association and petition activities.

4. Other Times Are Inadequate.

Requiring grassroots lobbying to be conducted before the blackout periods severely compromises the effectiveness of the lobbying. If it is a week before a crucial legislative vote, there is no other available time than that week in which the people can receive the necessary information when it matters.

5. Not Naming a Candidate Is Inadequate.

Grassroots lobbying is ineffective without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state have a position on legislation that differs from others and so would be the object of grassroots lobbying. And many citizens do not know the names of their members of

Congress, so would not know whom to call. A statute requiring that grassroots lobbying ads ask listeners to simply "Call your member of Congress," without naming the legislator needing calls, would render grass-lobbying ineffective.[31]

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[31]Judge Leon singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293.

McConnell, 251 F. Supp. 2d at 794 (emphasis in original).

Conclusion

McConnell did not, could not, eliminate as-applied challenges to BCRA's electioneering communication prohibition. Grassroots lobbying is essential to a republican form of self-government and poses none of the constitutional concerns identified in *McConnell*. It is different in kind from the "sham issue ads" considered in *McConnell* and is not the functional equivalent of express advocacy. So the people may not be prohibited from employing the most effective means to lobby their members of Congress about upcoming votes. Further, on these facts, the prohibition "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Citizens Against Rent Control*, 454 U.S. at 299. "Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

As a result, this Court should find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying generally, or as applied to the three broadcast advertisements here. Alternatively, the prohibition should be declared unconstitutional as applied, if made with disbursements from a segregated bank account as described in 2 U.S.C. § 434(f)(2)(E) (donations only from individuals) . The case should be remanded for entrance of an appropriate injunction.

Respectfully submitted,

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